

**Anevim v Pita**

2022 NY Slip Op 33072(U)

September 9, 2022

Supreme Court, New York County

Docket Number: Index No. 153803/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

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ISAAC ANEVIM

Plaintiff,

- v -

ORLANDO PITA,

Defendant.

INDEX NO. 153803/2021

MOTION DATE 09/21/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Oral argument took place on June 22, 2022 with Jeffrey Schwartz appearing on behalf of Plaintiff Isaac Anevim (“Buyer” or “Anevim”) and Ryan O. Miller appearing on behalf of Defendant Orlando Oita (“Seller” or “Pita”). Upon the foregoing documents and oral argument, Seller’s motion for summary judgment is granted.

**I. Factual and Procedural Background**

On February 16, 2021, Buyer Anevim and Seller Pita agreed to a Contract of Sale (the “Contract”) where Anevim agreed to purchase Pita’s condominium located at 70 Green Street, Unit 3, New York, New York, 10012 (the “Apartment”) for \$3,350,000 (NYSCEF Doc. 14). The Contract contained a mortgage contingency clause (*id.*). The mortgage contingency clause obliged Anevim to obtain a mortgage commitment within 40 days of execution of the Contract (the “Commitment Date”) (*id.*) The Commitment Date was March 29, 2021. The mortgage contingency clause also allowed Pita to cancel the Contract if Anevim did not obtain a mortgage commitment

by the Commitment Date and Pita gave notice to Anevim of his intent to cancel within 5 days from the Commitment Date (*id.* at ¶ 22(h)).

On March 5, 2021, Anevim's transactional attorney, Debra A. Pandolfo ("Ms. Pandolfo") informed Pita's transactional attorney, Steven Matz ("Mr. Matz") that Anevim was denied a mortgage. In the same correspondence, Ms. Pandolfo suggested the contract might be terminated and Anevim's down payment returned (NYSCEF Doc 15). On March 26, 2021, Ms. Pandolfo stated that Anevim was seeking another potential mortgage and requested an extension of the Commitment Date (NYSCEF Doc. 16). Pita rejected the request for an extension and sent a cancellation notice on April 1, 2021 (NYSCEF Doc. 17). On April 5 and 6, 2021, Anevim tried to avoid cancellation by stating that he waived the mortgage contingency and wanted to proceed on an all-cash basis (*id.*). Pita again rejected and asked for wiring instructions to return Anevim's down payment (*id.*). Ms. Pandolfo provided wiring instructions to return the down payment on April 8, 2021 (*id.*). On April 9, 2021, the down payment was wired to Anevim (NYSCEF Doc. 18). On the same day, Anevim again requested proceeding on an all-cash basis, and Pita again rejected, asserting that the Contract was cancelled with the wiring of down payment and the notice of cancellation sent pursuant to the mortgage contingency clause (NYSCEF Doc. 19). There was no further response from Anevim after Pita's rejection.

Anevim then filed a Complaint initiating this action on April 20, 2021 (NYSCEF Doc. 1). Anevim seeks specific performance directing Pita to close on the sale of the Apartment (*id.* at ¶ 19). Anevim also filed a Notice of Pendency on the Apartment on April 20, 2021 (NYSCEF Doc. 2). On July 16, 2021, Pita filed its Answer with Counterclaims (NYSCEF Doc. 6). In its Counterclaims, Pita seeks declaratory judgment stating the Contract was cancelled on April 1,

2021, the *lis pendens* was improper and must be cancelled, and that Anevim has no further rights under the Contract (*id.* at ¶ 66). Seller also seeks attorneys' fees (*id.* at ¶ 70).

On September 5, 2021, Pita moved for summary judgment (NYSCEF Doc. 9). Pita seeks declaratory judgment, dismissal of Anevim's Complaint, cancellation of the notice of pendency, and an award of attorneys' fees. Anevim opposed the motion on the basis that Anevim could unilaterally waive the mortgage contingency and therefore it could not be a basis for Pita to cancel the Contract (NYSCEF Doc. 30). In reply, Pita argues that since the mortgage contingency gave Seller the right to cancel the Contract, Anevim was not entitled to unilaterally waive it (NYSCEF Doc. 35). Pita asserts that since he effectively cancelled the Contract, Anevim has no further rights under the Contract, meaning the Complaint must be dismissed and *lis pendens* vacated (*id.*).

## II. Discussion

### A. Standard

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*see e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

## B. Declaratory Judgment

Pita has established prima facie entitlement to summary judgment declaring that the Contract was cancelled on April 1, 2021. No party is disputing the terms of the Contract or claiming they are vague or ambiguous, therefore the plain meaning of the Contract entered into will be given effect (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]). The date by which Anevim had to obtain a mortgage commitment was March 29, 2021. Anevim did not obtain a mortgage commitment by that date. On April 1, 2021, Pita notified Anevim it wanted to cancel the contract and return the down payment. Paragraph 22(h) of the Contract gave Pita the right to cancel the contract by giving notice to Anevim within 5 business days after the Commitment Date (March 29, 2021) (NYSCEF Doc. 14). Paragraph 22(h) further provided that unless Anevim delivered a copy of a mortgage commitment within 10 business days after the Commitment Date, the cancellation would become effective (*id.*) It is undisputed that Anevim did not provide a copy of a mortgage commitment. Therefore, according to the terms of the Contract, when Pita gave notice that it was cancelling and would return the down payment on April 1, the Contract was cancelled.

Anevim attempts to raise an issue of fact by arguing that it could waive the mortgage contingency. However, a buyer can unilaterally waive a mortgage contingency only if it inures solely for her benefit (*Degree Sec. Systems, Inc. v F.A.B. Land Corp.*, 17 AD3d 402, 403 [2d Dept 2005]; *28 Properties, Inc. v Akleh Realty Corp.*, 309 AD2d 632, 633 [1st Dept 2003]). Here, the mortgage contingency clearly inured to both parties' benefit as it allowed either party to cancel the Contract if the mortgage contingency was not met. Therefore, Anevim's argument that he could unilaterally waive the mortgage contingency to proceed on an all-cash basis is without merit. Pita is entitled to declaratory judgment that the Contract was cancelled on April 1, 2021.

### C. Dismissal of Complaint

Pita is entitled to summary judgment dismissing Buyer's Complaint. Anevim's Complaint, which consists of one cause of action, seeks specific performance under the terms of the Contract (NYSCEF Doc. 1). However, as discussed in Section (II)(B), the Contract was cancelled since April 1, 2021. Moreover, Paragraph 22(h) of the Contract, which was the mechanism by which the Contract was cancelled, expressly states that "after cancellation, neither party shall have any further rights...or obligations or liabilities to the other by reason of this contract except that the down payment shall be promptly refunded." Since it is undisputed that the down payment was refunded, and the contract having been cancelled, Anevim has no rights under the Contract by which to seek specific performance. Therefore, the Complaint must be dismissed (*Foster v Lall*, 135 Misc. 2d 919 [Sup Ct, Queens County 1987] [holding buyer not entitled to specific performance where terms of mortgage contingency not complied with leading to cancellation of contract]).

### D. Cancelling Buyer's *Lis Pendens* on the Apartment

For the reasons listed above, the *lis pendens* must be cancelled pursuant to CPLR § 6514(a). Indeed, as Buyer's Complaint has been dismissed and Seller has moved to cancel the *lis pendens*, CPLR § 6514(a) provides that it is mandatory the *lis pendens* be cancelled.

### E. Attorneys' Fees

Attorneys' fees may only be awarded based on a statute or contractual provision (*EVEMeta, LLC v Siemens Convergence Creators Corporation*, 173 AD3d 551, 553 [1st Dept 2019]). Paragraph R18 of the Contract states that if either party "shall commence litigation against the other in connection herewith, the non-prevailing party shall reimburse the prevailing party for its reasonable attorneys' fees incurred in such action" (NYSCEF Doc. 14). Because Pita has

prevailed in this contract dispute against Anevim, pursuant to the terms of the Contract, Pita is entitled to be reimbursed reasonable attorneys' fees incurred in this action. Therefore, Pita is granted summary judgment entitling him to attorneys' fees.

Accordingly, it is hereby

ADJUDGED AND DECLARED that the Contract was cancelled on April 1, 2021 and the parties have no more rights or obligations under the terms of the Contract; and it is further,

ORDERED that Buyer's motion is dismissed in its entirety; and it is further,

ORDERED the motion of Seller for an order for the cancellation of a notice of pendency filed herein against Seller is granted; and it is further

ORDERED that the notice of pendency filed on the 20th day of April, 2021 in the Office of the County Clerk of New York County against Seller Orlando Pita and the same hereby is cancelled upon service of notice of entry of this Decision and Order by Seller Orlando Pita upon the Clerk of the Court, and that, upon service of notice of entry of this Decision and Order by Seller Orlando Pita, the County Clerk of New York County is hereby directed to cancel the said notice of pendency and to record in his records a notation of such cancellation; and it is further,

ORDERED that Pita is entitled to reasonable attorneys' fees and that Counsel for Pita is directed to file an affirmation of legal services for attorneys' fees and expenses, requesting a specific sum, and detailing the justifications for the sum, and attaching proof (invoices or billing statements, etc.) as necessary, on or before October 10, 2022. Anevim may submit an opposition to the reasonableness of said attorneys' fees on or before October 17, 2022. Pita may file a rebuttal to any opposition submitted by Anevim by October 21, 2022. Any submissions as directed in this Order shall be e-filed on or before the specified dates, and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the Decision and Order of the Court.

9/9/2022  
DATE

Mary V Rosado  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE